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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 241

LYDDON & COMPANY (AMERICA) INC.,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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—vs.—

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the orders of the United States Court of Claims entered herein on March 5th and May 7th, 1958. The first of these orders denied petitioner's motion for summary judgment. The second amended the first order to provide, in addition, for final dismissal of the petition. Two members of the Court dissented.

Opinions Below

The majority and the dissenting opinion below are not yet officially reported but are unofficially reported in 158 F. Supp. 951; they are copied here as Appendix A and the order amending the majority opinion as Appendix B.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1255.

Questions Presented

May the Bureau of Internal Revenue circumvent 1939 I.R.C. Section 272(a)(1) (now 1954 I.R.C. Section 6213(a)) —which prohibits assessment or collection of any deficiency before a 90 day notice is issued and authorizes an appeal to the Tax Court within that 90 day period—merely by entering an "assessment" on an assessment list?

Is the taxpayer without remedy in such a case unless he can put up a bond for the tax and obtain an injunction under Section 272(a)(1)?

Where the Bureau exacted moneys without making lawful assessment within the period of limitations and the taxpayer repeatedly demanded that assessments be made and cautioned that the limitation period was running out, is not the taxpayer entitled to seek refund pursuant to 1939 I. R. C. Section 3770(a)(2) (now 1954 I. R. C. Section 6401(a))?

Statutes and Federal Rules Involved

The pertinent portions of Sections 271, 272, 727 and 3770 of the Internal Revenue Code of 1939 and Federal Rule of Civil Procedure 65 are set forth in Appendix C.

Statement

Petitioner sues for the recovery of $117,149.20 of excess profits taxes and interest collected from it for its fiscal years 1942, 1943, 1944 and 1945, on the ground that the taxes were never assessed and were collected after the running of the statute of limitations had made assessment impossible.

Petitioner filed blank excess profits tax returns for these years which contained only a claim for exemption under Sec. 727(g) of the Internal Revenue Code of 1939. On February 19, 1946, to guard against possible penalties for not filing complete returns, petitioner filed amended returns for the years mentioned (R. pp. 3, 33; Exhibits A, B, C and D, affidavit of W. L. Kauffman). These returns were completely filled out, and included a mathematical computation showing the amount of tax which would be due from petitioner if it were subject to tax. Each return, however, had attached a rider stating that no tax was due on the ground that petitioner was exempt under Sec. 727(g) and not subject to the tax. Each return was accompanied by a letter reasserting the claim of exemption, quoting the rider which was annexed to the return, and stating that the claim of nonliability was the reason why no remittance accompanied the return (R. p. 102; Exhibit I, affidavit of W. L. Kauffman).

On receipt of these returns the Commissioner of Internal Revenue placed petitioner's name on his March 1946 "Assessment List" (R. p. 33), and on May 6, 1946, the Collector of Internal Revenue sent to petitioner, by unregistered mail, forms of "Notice and Demand", which recited that taxes had "been assessed against" petitioner for each of the years in question and demanded payment. The amounts demanded corresponded to the amounts which the petitioner's returns had indicated would be due if petitioner was not, as it claimed, exempt from the tax (R. pp. 4, 34; Exhibits J, K, L and M, affidavit of W. L. Kauffman).

The Commissioner never issued the 90 day notices of deficiency required as a prerequisite to assessment of deficiencies in tax by Section 272(a)(1) (pp. 5, 15, affidavit of W. L. Kauffman).

Petitioner repeatedly protested the Commissioner's purported assessment made without issuance of 90 day deficiency notices. Petitioner pointed out that without the notices it was unable, before being compelled to pay upon the "Notices

and Demands", to invoke the jurisdiction of the Tax Court to secure a decision as to whether it actually owed any amount.

Thus, on November 26, 1946, petitioner's counsel wrote the Collector of Internal Revenue pointing out the absence of any assessment and suggesting that:

> "The correct disposition of this matter is to remove this particular item from the assessment list (since there is no assessment) and to restore the situation which existed before the incorrect bills were sent out,"

and adding,

> "This matter is serious from the taxpayer's standpoint, primarily because the present procedure (if it is not corrected) may have the effect of depriving the taxpayer of its day in court, specifically, of its right to appeal to the Tax Court." (Exhibit N, affidavit of W. L. Kauffman.)

On December 9, 1946, in a letter to the Deputy Commissioner of Internal Revenue, petitioner's counsel stated:

> "What the Collector did in the present case was, in effect, to assert a deficiency in tax. He did this without examining the taxpayer's books and without giving the taxpayer an opportunity to be heard. This was done on the basis of a return in which the taxpayer himself expressly stated that no tax was due. Since the deficiency was asserted without statutory authority and without following any of the procedures required by Sections 271, 272 and 273 of the Internal Revenue Code, it was not an assessment at all * * *."
> (Exhibit O, affidavit of W. L. Kauffman.)

When these protests proved fruitless, petitioner, in a letter dated May 24, 1948, wrote the Internal Revenue Agent in Charge of the Upper New York District and expressly

stated that it would "take full advantage of the limitation bar which will arise in its favor" unless the deficiencies should be legally asserted before the expiration of the period of limitations on assessment (Exhibit Q, affidavit of W. L. Kauffman).

By a series of extensions, duly executed by petitioner, the Commissioner's time to assess taxes for the years in suit was extended beyond the statutory three years from the filing of the Amended Returns to June 30, 1951 (R. p. 10, affidavit of W. L. Kauffman). Accordingly, the Commissioner was free at any time up to and including June 30, 1951 to withdraw the "Notices and Demands" and issue the notices of deficiency required by Section 272. Why the Commissioner persisted in refusing to take petitioner at its word and issue the required notices, the Record does not disclose (opinion below, R. pp. 105, 106).

Subsequently the Bureau exacted payment of the amounts purportedly assessed (R. pp. 5, 6, 7, 34, 35, 36, 37). Petitioner paid under protest and brought this suit for refund (Par. 14, affidavit of W. L. Kauffman).

Three judges of the Court of Claims held that the purported assessments, though not wholly valid, were not void and were, in the circumstances, sufficient to stop the running of the statute which limits the time within which taxes may be assessed. Two judges dissented on the ground that the purported assessments were void, that consequently the statute of limitations had run, and that petitioner was entitled to refund under Section 3770(a)(2).

If petitioner should prevail, the amount of recovery is undisputed (Petition and Answer, R. pp. 5, 6, 7, 34, 35, 36, 37).

Reasons for Granting the Writ

The decision below frustrates the purpose for which the Congress established the Board of Tax Appeals (now the Tax Court): to give taxpayers a forum in which disputed liabilities can be determined before payment. If unreversed, the

decision will establish a procedure whereby tax officials can arbitrarily coerce taxpayers into paying disputed amounts in disregard of the statute which gives taxpayers the right to litigate their liability before being forced to pay.

The decision conflicts with, and expressly rejects, the cases of *U. S.* v. *Yellow Cab Co.*, 90 F. 2d 699 (7th Cir.); *Ventura Consolidated Oil Fields* v. *Rogan*, 86 F. 2d 149 (9 Cir.); and *U. S.* v. *Barber*, 24 F. Supp. 229, which hold that "assessments" made in violation of Sec. 272 are wholly void.

The importance of the question of tax administration here presented and the desirability that the conflicting decisions be reconciled make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

The basic ground for dismissal of the petition below was that Petitioner was bound, as its exclusive remedy, to seek the injunction against assessment permitted by Section 272(a)(1) and by its failure to do so, was barred from questioning the admittedly illegal assessments. The Court below found that Petitioner was otherwise entitled to refund of the amounts it had paid as overpayments under Section 3770(a)(2). (Opinion below, R. p. 105.)

Yellow Cab, *supra*, which was expressly rejected by the majority below, holds that assessments made in violation of Section 272 are void and entitle the taxpayer to refund even though no attempt was made to obtain an injunction. *Yellow Cab* holds that the injunctive remedy is permissive and is not exclusive. There is cogent support for this conclusion.

Section 272(a)(1) *forbids* the Commissioner ("no assessment of a deficiency * * * shall be made") from making any assessment of a deficiency before complying with the provisions of the section regarding the issuance of notice of deficiency. The same section *permits* the taxpayer ("Such assessment * * * may be enjoined") to enjoin the making of an assessment in violation of the section. The majority below gives a directly opposite construction to the section by hold-

ing that the Commissioner *may* "assess" in violation of the section, and that such assessment will not be held void unless the taxpayer *shall* sue to enjoin it.

Clearly, injunction as an exclusive remedy may be wholly inadequate to preserve the rights given to the taxpayer by Section 272. To obtain an injunction the taxpayer may be required to give a bond in the full amount of the tax to assure the Government against loss from delay in collecting it. *Federal Rule of Civil Procedure* 65(c). Thus, in any instance where an arbitrary or excessive assessment is made, a taxpayer who cannot obtain a bond on his own credit is, in effect, by the process of posting security, forced to pay the tax without having his right of prior adjudication in the Tax Court. If the taxpayer cannot produce security and is then forced to pay whatever part of the sum "assessed" he possesses, he is without any remedy at all, since, under this Court's decision in *Flora v. United States*, (June 16, 1958) U. S. —, 2 L. Ed. 2nd 1165, 78 S. Ct. —, no suit for refund may be maintained in any court unless the entire sum "assessed" has been paid. Surely Congress did not intend the Tax Court system for prepayment review of deficiencies to be thus emasculated or reserved for taxpayers with triple A credit ratings.

The majority below, although conceding that this contention has merit and although acknowledging the existence of uniformly contrary decisions in the other Federal Courts (opinion below R. p. 106), nevertheless held that Congress, by providing that the taxpayer might seek to enjoin collection of the tax until an unexceptionable assessment is made "has safeguarded the taxpayer from any possible harmful consequences of the premature assessment" (R. p. 106). This conclusion might be justified in a case where the taxpayer received a notice of deficiency (as in *Lehigh Portland Cement Co. v. U. S.*, 90 Ct. Cls. 36, relied on by the majority below) and thus had the right to appeal to the Tax Court. Here, however, the petitioner never received deficiency notices and consequently, its right to adjudication in the Tax Court before payment never came into being (R. p. 101).

To support its ruling dismissing the petition, the majority below said that to hold the "assessments" void would make the amounts paid by petitioner recoverable without proof of the substantive fact of non-liability since amounts not assessed within the period of limitations on assessment are recoverable as over-payments under Section 3770(a)(2). (R. p. 106). While this is true it is irrelevant. There is no warrant in this case for holding that the validity of the "assessments" should be determined by the consequence which might attach to recognition of the fact that they are void. There are substantial equitable reasons underlying Section 3770(a)(2); taxpayers should not be required to establish the merits of a complicated tax issue where such an extensive period of time has passed since the taxable incidents occurred. This is particularly true in a case such as this one, where the Bureau arbitrarily refused to conform its procedure to the law. The Bureau had every opportunity to give this petitioner the notices required by Section 272 without prejudicing the revenues. On the undisputed record here, the majority below was not justified in concluding that the purported assessments were of sufficient validity to defeat petitioner's claim.

This Court should give effect to the Congressional mandate expressed in Section 272 by declaring that the Bureau's "assessments" were wholly void. In the words of Judge Laramore, dissenting below,

> "Section 272(a)(1) requires that the Commissioner issue a 90-day letter before assessment of a deficiency. I think this section is mandatory. Any other interpretation would prevent taxpayer from seeking relief in the Tax Court * * *. It seems to me that the failure to exercise a right to enjoin an invalid assessment cannot of itself make an invalid assessment valid. There can be no question that if the assessments herein involved were void and of no effect, the statute of limitations has run and under Section 3770(a)(2), plaintiff is entitled to a refund." (R. p. 107).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

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APPENDIX A

(Opinions by Court of Claims)

IN THE UNITED STATES COURT OF CLAIMS

No. 13—53

(Decided March 5, 1958)

EYDDON & COMPANY (AMERICA) INC. v. THE UNITED STATES

Mr. Meyer Grouf for the plaintiff. *Messrs. Harold Manheim* and *Robert Braunschweig* were on the briefs.

Mr. William T. Kane, with whom was *Mr. Assistant Attorney General Charles K. Rice,* for the defendant. *Messrs. Lyle M. Turner* and *Robert Livingston* were on the brief.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff sues for the recovery of $117,149.20 of excess profits taxes and interest collected from it for its fiscal years 1942, 1943, 1944 and 1945, together with interest thereon. The ground for its motion is that, it asserts, the taxes were never assessed against it, and were collected after the statute of limitations had made assessment impossible. The plaintiff relies on section 3770 (a) (2) of the Internal Revenue Code of 1939, which says:

> Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

The plaintiff's claim for refund and its suit in this court were timely.

The plaintiff claimed that it was not subject to the excess profits tax because of the relation of its business to foreign commerce. This motion is not concerned with the merits of that claim. Because it claimed to be exempt from the tax, it filed, for the years here in question, the Government's printed forms for excess profits tax returns, but filled in only its name and address and the words "see rider attached" or, "see explanation on page 2 hereof." On a separate rider, or in a blank space on page 2 of the form, it stated that it was not subject to the excess profits tax and gave the reason for that position.

A revenue agent, in examining a similar filing of the plaintiff for 1941, disallowed that claim and the plaintiff was subsequently advised by counsel that it might get into difficulties because of failure to file a return. Thereupon on February 19, 1946, the plaintiff filed "amended excess profits tax returns" for each of the years here involved. These returns were completely filled out with all the information necessary to compute the excess profits tax, and with the computation showing the amount of the tax. Inside each one was attached a rider claiming exemption from the tax and giving reasons for the exemption. With each return was a letter asserting the claim to exemption, quoting the rider which was inside the return, and stating that the claim of nonliability was the reason why no remittance accompanied the return.

As we have said, these "amended returns" were filed on February 19, 1946. On the March 1946 assessment list, the Commissioner purported to assess taxes and interest against the plaintiff on the basis of the figures and computations shown on the forms which the plaintiff had filed. On May 6 of the same year the plaintiff received a notice of the assessment for each of the years, which notice stated the amount of each assessment, and made demand for its immediate payment.

On November 26, 1946, the plaintiff by letter protested the action of the Commissioner in purporting to assess the taxes and interest without giving the plaintiff a 90-day deficiency notice as provided in section 272 of the 1939 Internal Revenue Code. Similar protests were made on December 9, 1946, and May 24, 1948.

Section 272 authorizes the Commissioner, if he determines that there is a deficiency, to send the taxpayer by registered mail a notice of the deficiency. It authorizes the taxpayer, at any time within 90 days from the day the deficiency letter is mailed, to petition the Tax Court for a redetermination of the deficiency. It then says:

> * * * No assessment of a deficiency in respect to the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

The plaintiff says that since no 90-day deficiency notice was ever sent to it, and since section 272 says that "No assessment of a deficiency * * * shall be made * * * until such notice has been mailed * * * nor until the expiration of such ninety-day period * * *," the taxes here in question were never assessed, and were collected at a time when they could no longer have been assessed because the statute of limitations had run.

When one files a tax return showing taxes due, he has, presumably, assessed himself and is content to become liable for the tax, and to pay it either when it is due according to the

statute, or when he can get the money together. At any rate he shows no desire to resort to the Tax Court to contest the assessment. The Commissioner has no occasion to determine a deficiency and give the taxpayer notice of it, since at that stage, and until an audit shows something different, the taxpayer's own computation of his taxes may be taken as correct. The only notice which will be sent to the taxpayer will be a notice that the taxes shown to be due by his return should be paid immediately, with appropriate interest.

When a taxpayer, as did the plaintiff, furnishes, on the conventional form, the necessary information, and makes the necessary computation to determine the amount of the tax, but accompanies this return with a claim that no taxes are owing, for a stated reason, how should the Commissioner treat this filing? If he treats it as no return, and seeks to attach to it the painful consequences of a failure to file a return, that seems unfair to the taxpayer, who has been completely frank with the Commissioner. If he treats it as an ordinary return, and the lack of an accompanying check as a mere failure to pay the tax shown by the return to be owing, it is not a case for the determination of a deficiency, and a 90 day notice to the taxpayer that unless he petitions the Tax Court within the 90 days, the deficiency will be assessed and collected. The deficiency referred to in section 272 is, ordinarily at least, a shortage arising out of circumstances not disclosed in the return.

The plaintiff's filing, done purposely in the form it was in to avoid the penalties of failing to file a return, is a document to which it is somewhat difficult to assign a definite classification. Both parties were aware, throughout their dealings extending through many years, of all the relevant facts, and of the contention of the plaintiff that the taxes had never been validly assessed. The purpose of the procedure prescribed by section 272 is not, however, merely to assure the taxpayer of notice of impending action by the Commissioner. Its purpose is also to give the taxpayer the opportunity to try to prevent the assessment by petitioning the Tax Court,

instead of raising the money, if he can, paying the tax, and later suing for a refund in a court having that jurisdiction.

In the instant case, if the Commissioner had treated the taxpayer's disclaimer of liability as showing a deficiency, and had mailed it a 90-day letter, the taxpayer could have gone to the Tax Court and tried out the validity of its claim of exemption. Without the 90-day letter it could not resort to that court. That may have been a hardship in the plaintiff's case. In protesting the Commissioner's alleged failure to make an assessment, it reminded him that he was thereby denying it the right to resort to the Tax Court.

The Government urges that the plaintiff was, by section 272, given another avenue of relief just as good as resort to the Tax Court. It points out that, in the plaintiff's situation, it could have sought an injunction in a United States District Court. The plaintiff says first that would not have been an equivalent remedy because, to obtain an injunction, it would have had to give a bond to assure the Government against loss from the delay in collecting the tax. There is some merit in this contention. This court's decision in *Lehigh Portland Cement Co. v. United States*, 90 C. Cls. 36, tends to support the Government's position on the injunction question.

The Government relies on the accepted principle that in a suit for the refund of taxes the ultimate question is whether the plaintiff overpaid its taxes. It quotes from *Lewis v. Reynolds*, 284 U. S. 281, 283, as follows:

> An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

In *Stone v. White*, 301 U. S. 532, the Court said that a suit to recover taxes erroneously paid is the lineal successor

of the *indebitatus assumpsit* count in a common law declaration; that statutes authorizing suits for the refund of taxes are predicated upon the same equitable principles that underlie that common law action; and that it is open to the defendant to show any state of facts which, according to equitable standards, would deny the right of recovery. In *Thomaston Cotton Mills* v. *Rose*, 62 F. 2d 982 (5th Cir. 1933), the court applied this doctrine in a case where the Commissioner made the assessment immediately without waiting for the expiration of the period for petitioning the Board of Tax Appeals.

The universal application of a principle that one cannot have a refund of taxes unless he has overpaid his taxes would contradict section 3770 (a) (2), quoted above. That section expressly says that any tax assessed or paid after the expiration of the period of limitation applicable thereto shall be refunded. We must therefore determine whether the statute of limitations had run against the assessment of this tax, at the time it was paid. The Commissioner's action in assessing the tax on the computation shown by the plaintiff's return was understandable, since the plaintiff's filing was, at best, an ambiguous one. Why, in the face of repeated protests, the Commissioner persisted in refusing to take the plaintiff at its word and issue a 90-day letter, we don't know. But we think the Commissioner's purported assessment, and the immediate notice of it to the plaintiff, stopped the running of the statute of limitations.

The purported assessment was, we think, not a complete nullity. In the case of *Lehigh Portland Cement Co.* v. *United States*, *supra*, at page 60 ff., this court considered the problem of the consequences of a premature assessment which, as in the instant case, did not bring about any overpayment of taxes. The court decided that a premature assessment is not void; that Congress, by expressly providing that the taxpayer may obtain an injunction against the collection of the tax until an unexceptionable assessment has been made, has safeguarded the taxpayer from any possible

harmful consequences of the premature assessment. The court analyzed and discussed the cases of *Ventura Consolidated Oil Fields* v. *Rogan*, 86 F. 2d 149 (9th Cir. 1936); *United States* v. *Yellow Cab Co.*, 90 F. 2d 699 (7th Cir. 1937); and *United States* v. *Barber*, 24 F. Supp. 229, and declined to follow those cases in their conclusions that a premature assessment is void and enables a taxpayer to recover taxes which he in fact owed the Government.

We recognize that in the *Lehigh Portland Cement Company* case there was no equity at all in the taxpayer's favor. The reasoning of the court in that case is nevertheless applicable to the instant one, and we adhere to that reasoning. We conclude, therefore, that the purported assessment made by the Commissioner of Internal Revenue in March 1946, assuming that it was not a wholly valid assessment, was not void, and was, in the circumstances, sufficient to stop the running of the statute of limitations which limits the time within which taxes may be assessed. It follows that the taxes here in question were not refundable under the provisions of section 3770 (a) (2). We conclude that the taxes were paid before the expiration of the statute of limitations, and they cannot be recovered, unless they were, on the merits, not owed by the taxpayer.

Section 3770 (a) (2) is a drastic statute, in derogation of the common law in its provision that one who pays a debt which he owes, but the collection of which is barred by the statute of limitations, may recover the money paid. We think Congress would not have intended that a broad interpretation should be given to the statute of limitations, in order to place a payment of taxes within the reach of section 3770 (a) (2).

The plaintiff's motion for summary judgment is denied.

It is so ordered.

LITTLETON, *Judge*, and JONES, *Chief Judge* concur.

LARAMORE, *Judge*, dissenting:

I respectfully dissent for the following reasons:

Section 272 (a) (1) requires that the Commissioner issue a 90-day letter before assessment of a deficiency. I think this section is mandatory. Any other interpretation would prevent taxpayer from seeking relief in the Tax Court.

In the *Lehigh* case, relied upon by the majority, the taxpayer did have the statutory notice of deficiency and had the right to appeal to the Board of Tax Appeals, now the Tax Court. In the present situation, plaintiff was completely foreclosed from resorting to the Tax Court unless it filed injunction proceedings in the proper court.

It seems to me that the failure to exercise a right to enjoin an invalid assessment could not of itself make an invalid assessment valid.

There can be no question that if the assessments here involved were void and of no effect, the statute of limitations has run and under section 3770 (a) (2) plaintiff is entitled to a refund.

I would grant plaintiff's motion for summary judgment.

WHITAKER, *Judge*, joins in the foregoing dissent.

APPENDIX B

(Order Amending Majority Opinion)

IN THE

UNITED STATES COURT OF CLAIMS

No. 13—53

LYDDON & COMPANY (AMERICA) INC.,

—v.—

THE UNITED STATES.

ORDER

This case comes before the court pursuant to a memorandum report of the commissioner filed April 4, 1958, in which it is recommended that the petition be dismissed in view of plaintiff's waiver of its right to offer evidence on the issue of its substantive liability for excess profits tax for the years in question, as contemplated by the court's opinion of March 5, 1958, which denied plaintiff's motion for summary judgment. Upon consideration thereof,

IT IS ORDERED this seventh day of May, 1958, that the opinion of March 5, 1958, be and the same is amended in that the last sentence is deleted in its entirety and the following substituted in its place:

> The plaintiff's motion for summary judgment is denied, and plaintiff's petition will be dismissed.

BY THE COURT

MARVIN JONES,
Chief Judge.

APPENDIX C

(Statutes, Rules and Regulations Involved)

Internal Revenue Code of 1939:

SEC. 271. DEFINITION OF DEFICIENCY.

(a) (As amended by Sec. 14(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231) *In General.*—As used in this chapter in respect of a tax imposed by the chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of——

> (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, * * *

(26 U. S. C. 1952 ed., Sec. 271).

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) (As amended by Sec. 203(a), Act of December 29, 1945, c. 652, 59 Stat. 669) *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court,

until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a), the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * * *

(26 U. S. C. 1952 ed., Sec. 272.)

SEC. 727 (As added by Sec. 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Sec. 223(a.), Revenue Act of 1942, c. 619, 56 Stat. 798) EXEMPT CORPORATIONS.

The following corporations, except a member of an affiliated group of corporations filing consolidated returns under section 141, shall be exempt from the tax imposed by this subchapter:

* * * * *

(g) Domestic corporations satisfying the following conditions:

(1) If 95 per centum or more of the gross income of such domestic corporation for the three-year period immediately preceding the close of the taxable year (or for such part of such period during which the corporation was in existence) was derived from sources other than sources within the United States; and

(2) If 50 per centum or more of its gross income for such period or such part thereof was derived from the active conduct of a trade or business.

* * * * *

(26 U. S. C. 1952 ed., Sec. 727.)

SEC. 3770. AUTHORITY TO MAKE ABATEMENTS, CREDITS, AND REFUNDS.

(a) *To Taxpayers.*—

(2) *Assessments and collections after limitation period.*—Any tax (or any interest, penalty additional amount, or addition to such tax) assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3770.)

Federal Rules of Civil Procedure

Rule 65, Injunctions

"(c) *Security.* No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. As amended Dec. 27, 1946, effective March 19, 1948."

(28 U. S. C. Rule 65.)

Certificate of Service

I, Harold Manheim, counsel for petitioner in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 30th day of July, 1958, I served copies of the foregoing petition for a writ of certiorari on the United States of America, Respondent, by causing copies thereof to be mailed in duly addressed envelopes, with postage prepaid, to The Attorney General, Department of Justice, Washington 25, D.C. and the Solicitor General, Department of Justice, Washington 25, D.C.

Dated, July 30th, 1958.

HAROLD MANHEIM,
Counsel for Petitioner

No. 241

In the Supreme Court of the United States

OCTOBER TERM, 1958

LYDDON & COMPANY (AMERICA) INC., PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. 10-17) is reported at 158 F. Supp. 951.

JURISDICTION

The taxpayer's motion for summary judgment was denied on March 5, 1958. (Pet. 10, 16.) On May 7, 1958, the order was amended to provide, in addition, for dismissal of the taxpayer's petition. (Pet. 18.) The petition for a writ of certiorari was filed on July 31, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether, in a tax refund suit, a taxpayer may obtain a refund of taxes which it does not now con-

tend were not properly due and owing, on the ground that no notice of deficiency was sent to it by the Commissioner as required by Section 272(a)(1) of the Internal Revenue Code of 1939.

STATUTES INVOLVED

The relevant provisions of Sections 271(a), 272(a), and 3770(a) of the Internal Revenue Code of 1939 may be found in the Appendix, *infra*, pp. 9-10.

STATEMENT

The taxpayer is a New York corporation. (R. 1.) For its fiscal years ended June 30, 1942, to June 30, 1945, inclusive, taxpayer filed excess profits tax returns which gave the taxpayer's name and address and stated that taxpayer was exempt from excess profits taxes. These returns were not otherwise filled out and gave no information upon which a tax could be computed or assessed. (R. 2-3.) In February, 1946, the taxpayer filed amended excess profits tax returns for each of these years, containing information and computations resulting in the following amounts of excess profits tax (R. 3-4):

Year	*Amount*
June 30, 1942	$ 1,057.37
June 30, 1943	62,157.57
June 30, 1944	16,158.96
June 30, 1945	22,653.28

Attached to the inside of each of these returns was a rider in which the taxpayer again claimed it was exempt from excess profits taxes. (R. 3, 11-12.)

On the March, 1946, assessment list, the Commissioner of Internal Revenue assessed taxes and interest

against the taxpayer based on the amount of tax liability shown on the face of the amended returns. (R. 33.) On May 6, 1946, the taxpayer was given notice of such assessments. Each notice stated the date of the assessment list and the amount of the assessment, and made demand for the immediate payment thereof. (R. 4, 34; Ex. J-M to Affidavit of William L. Kauffman.)

On November 26, 1946, the taxpayer by letter protested the action of the Commissioner in assessing taxes and interest without giving the taxpayer a 90-day deficiency notice as required by Section 272 (a)(1) of the Internal Revenue Code of 1939. Similar protests were made on December 9, 1946, and May 24, 1948. (Ex. N-Q to Affidavit of William L. Kauffman.)

The taxes and interest in dispute were paid in 1951 and 1952, in part by the crediting of certain overassessments and in part by checks sent by the taxpayer. All of the payments were made within six years of the Commissioner's original assessment of March, 1946. (R. 4-7, 34-37.)

The taxpayer then filed timely claims for refund, and no action having been taken on them within six months, filed its petition in the Court of Claims. (R. 8-9, 37-38.) In that court the taxpayer filed a motion for summary judgment (R. 39), relying solely on its position that the taxes and interest were illegally collected, the illegality resulting from the failure to send a deficiency notice prior to the assessments (R. 40-55). Prior to filing the motion the taxpayer advised the Commissioner of the Court of Claims that it did not intend to try the question of liability for the

taxes, but would rest its case solely on the legality of the assessment. (R. 108.) The Court of Claims denied the motion for summary judgment. (R. 107.) Thereafter the taxpayer advised the Commissioner that it waived its right to offer evidence on the issue of its substantive liability for the excess profits taxes in question. (R. 109). The Court of Claims thereupon entered an order dismissing the taxpayer's petition. (Pet. 18.)

ARGUMENT

This is a tax refund suit in which the taxpayer is seeking recovery of taxes paid although it has made no effort to show that the amounts paid did not represent its correct tax liability, and has stated that it does not desire to make such a showing. The denial of taxpayer's motion for summary judgment and dismissal of its petition by the Court of Claims was consistent with the principles set forth by this Court in *Lewis* v. *Reynolds*, 284 U.S. 281, 283, that—

> An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received, when they do not exceed the amount which might have been properly assessed and demanded.

See, also, *Stone* v. *White*, 301 U.S. 532, rehearing denied, 302 U.S. 639.

The taxpayer's contention is that under Section 272(a)(1) of the Internal Revenue Code of 1939 (Apendix, *infra*, pp. 9-10) the assessment of March,

1946, was wholly void (Pet. 8), that the statute of limitations on making an assessment expired on June 30, 1951 (Pet. 5), and therefore (Pet. 8) that the taxes paid after that date must be refunded pursuant to Section 3770(a)(2) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 10). This contention disregards the fact that this Court in *Lewis* v. *Reynolds*, *supra*, and in *Stone* v. *White*, *supra*, declined to give such broad effect to the predecessor of Section 3770(a)(2).

Furthermore, it rests upon a questionable interpretation of Section 272(a)(1), one rejected not only by the Court of Claims, but also by the Courts of Appeals for the Ninth and Tenth Circuits. That section provides that the Commissioner, when he determines that there is a deficiency, is authorized to send notice of such deficiency to the taxpayer. It then provides that within ninety days the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Then follow the provisions here relevant:

> No assessment of a deficiency in respect to the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

The taxpayer did not seek an injunction, although it could have enjoined assessment or collection under this section, assuming *arguendo* that on the basis of the returns there was a deficiency, and that a notice of deficiency was therefore appropriate (but see opinion below, Pet. 12-13). Rather, taxpayer rested on its present contention that the assessment was wholly void.

Taxpayer relies upon *United States* v. *Yellow Cab Co.*, 90 F. 2d 699 (C.A. 7th), and *United States* v. *Barber*, 24 F. Supp. 229 (D. Md.). These cases do support taxpayer's position. They were decided, however, prior to the decision of the Court of Claims in *Lehigh Portland Cement Co.* v. *United States*, 30 F. Supp. 217, in which the court, in an exhaustive opinion by Judge Littleton, traced in detail the legislative history of the applicable provisions, concluding that an assessment in disregard of the section could be enjoined but was not wholly void. The *Lehigh Portland Cement* case was followed in *Ryan* v. *Alexander*, 118 F. 2d 744, 750 (C.A. 10th), certiorari denied, 314 U.S. 622.

Ventura Consolidated Oil Fields v. *Rogan*, 86 F. 2d 149 (C.A. 9th), certiorari denied, 300 U.S. 672, was not a refund case, but an injunction suit. Subsequently, in *Van Antwerp* v. *United States*, 92 F. 2d 871, the Court of Appeals for the Ninth Circuit, speaking through the same judge as in *Ventura*, held that in a refund suit the taxpayer must show that he does not owe the tax, regardless of the legality of collecting an alleged deficiency without giving the statutory deficiency notice. The Ninth Circuit relied upon the principle set out by this Court in *Lewis* v.

Reynolds, *supra*, and distinguished (p. 874) the *Yellow Cab Co.* case on the ground that, although that was a refund suit, the court there was not asked to consider the relevance of the principle that in a refund suit the taxpayer must show he does not owe the tax.

Accordingly, the Courts of Appeals for the Ninth and Tenth Circuits agree with the construction placed on Section 272(a)(1) by the Court of Claims. The decision of the Court of Appeals for the Seventh Circuit to the contrary was given without the benefit of the research in the *Lehigh Portland Cement* case, and without consideration of the principles applicable to refund suits. There is not, therefore, such a conflict among the Courts of Appeals as to call for the present intervention of this Court.

Furthermore, the question is one of infrequent occurrence. The present case is an unusual one, starting with a return which, as the court below points out (Pet. 13), was ambiguous. The taxpayer could have presented its contention as to the invalidity of the assessment by an injunction suit, but chose not to do so.[1] It has had its day in court in the present refund suit, and has rejected its opportunity to show that the taxes assessed were not in fact due.

The taxpayer also relies (Pet. 7-8) on the dissenting opinion below (Pet. 17) which would distinguish the *Lehigh Portland Cement* case on the ground that

[1] The taxpayer contends that this is not an adequate remedy because of the requirement of posting a bond. (Pet. 7.) It does not suggest that in its own case this requirement was an obstacle. Furthermore, the injunction is the remedy which Congress has prescribed.

there the taxpayer had a notice of deficiency, even though the assessment was premature, while here no notice had been issued. However, we think the difference is immaterial, a view reflected in the Ninth Circuit decision in the *Van Antwerp* case, *supra*, where the broad general principle was recognized that one who confessedly owes a tax cannot rely upon technicalities in order to obtain a refund. That is the principle which the majority of the court below properly recognized and which alone suffices to dispose of the taxpayer's present contentions.

It may be that taxpayer could not have appealed to the Tax Court because no notice of deficiency was issued. But this has become immaterial here, since taxpayer is no longer contesting the merits of the assessment, and accordingly there would be nothing for the Tax Court to pass upon.

CONCLUSION

For the foregoing reasons, we submit that the petition for certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

L. W. POST,
DAVID O. WALTER,
Attorneys.

AUGUST, 1958

APPENDIX

Internal Revenue Code of 1939:

SEC. 271. DEFINITION OF DEFICIENCY.

(a) [As amended by Sec. 14(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231][2] *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) [As amended by Sec. 504(c), Revenue Act of 1942, c. 619, 56 Stat. 876; Sec. 203(a), Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the

[2] Effective for years after December 31, 1941. The amendment did not substantively change the prior law.

Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 3770. AUTHORITY TO MAKE ABATEMENTS, CREDITS, AND REFUNDS.

(a) *To Taxpayers.*—

* * * *

(2) *Assessments and collections after limitation period.*—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3770.)

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IN THE

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OCTOBER TERM, 1958

No. 241

LYDDON & COMPANY (AMERICA) INC.,
Petitioner

—vs.—

THE UNITED STATES,
Respondent.

PETITIONER'S REPLY BRIEF

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Respondent.

PETITIONER'S REPLY BRIEF

I

Respondent makes the unsupported assertion (Respondent's Brief, p. 7) that this case presents a question of "infrequent occurrence." The true importance of this case does not lie in speculation on whether the unexplained conduct of the Commissioner, as disclosed by the record here, will be of frequent or infrequent occurrence. Its importance lies in the fact that the decision below, if unreversed, will establish a procedure whereby tax officials can arbitrarily exact disputed amounts from taxpayers in disregard of their right to prepayment review in the Tax Court. Correct decision of this case is thus of prime importance in maintaining a revenue system which functions under law rather than administrative caprice.

II

Respondent asserts (Respondent's Brief, p. 4) that this court's decisions in *Lewis* v. *Reynolds*, 284 U. S. 281 and *Stone* v. *White*, 301 U. S. 532, support the dismissal of the petition below. This is not correct. In both *Lewis* v. *Reynolds* and *Stone* v. *White*, the taxes for which refund was sought had been assessed before the statute of limitations on assessment expired, and neither Section 3770(a)(2) of the Internal Revenue Act of 1939 nor its predecessor, Section 607 of the Internal Revenue Act of 1928, were applicable. The basis of the present petition is that the taxes in suit were not assessed before the statute of limitations on assessment expired, that Section 3770(a)(2) controls and that under that Section petitioner is entitled to recover without proof of the facts pertaining to its substantive tax liability. Even the majority below rejected the Government's assertion that, in a suit under Section 3770(a)(2), the question of whether plaintiff overpaid its taxes is material (R. 106, 107).

Respectfully submitted,

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Certificate of Service

I, Harold Manheim, counsel for petitioner in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 9th day of September, 1958, I served copies of the foregoing ~~petition for a writ of certiorari~~ Reply Brief on the United States of America, Respondent, by causing copies thereof to be mailed in duly addressed envelopes, with postage prepaid, to The Attorney General, Department of Justice, Washington 25, D.C. and the Solicitor General, Department of Justice, Washington 25, D.C.

Dated, September 9th, 1958.

HAROLD MANHEIM,
Counsel for Petitioner.